

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

74-1955

To be argued by
THOMAS J. O'BRIEN

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P15

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS.

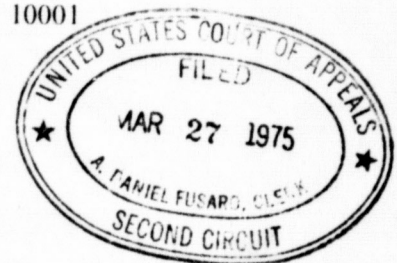
ROBERT VISSA,

Defendant-Appellant.

*On Appeal from the United States District Court for the
Southern District of New York*

BRIEF FOR APPELLANT

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74 - 1955

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Robert Vissa

Defendant-Appellant.

BRIEF FOR APPELLANT
ROBERT VISSA

Preliminary Statement

The Appellant, Robert Vissa, appeals from a Judgment of Conviction entered in the United States District Court for the Southern District of New York. (Lasker J). After trial a jury found the Appellant guilty of both counts of indictment 73 CR 1102. Count one of the indictment charged a conspiracy to possess and distribute marijuana in violation

of Title 21 United States Code Section 846. Count two charged the substantive offense of possessing marijuana with the intent to distribute in violation of Title 21 United States Code Sections 812, 841 (a) (1) and 841 (b) (1) (B). The Appellant was sentenced to imprisonment for a period of one year on each count to run concurrently on the condition that the Appellant be confined in a jail or treatment type institution for a period of six months and the balance of the sentence of imprisonment was suspended. In addition the appellants was placed on probation for six months and thereafter to a two year Special Parole period.

Statement of Facts

The two count indictment charged eleven co defendants with possessing marijuana with the intent of distributing it and with conspiring to do so from August, 1971 to December, 1973. The appellant Robert Vissa was tried together with six of the 11 co-defendants.

The proof supporting the conspiracy count related to five trips made to Jamaica in August, 1971, March, 1973, May, 1973, June, 1973, and August, 1973.

In May, 1973, 500 lbs. of marijuana was brought into the United States and is the basis for count 2 of the indictment.

The evidence, briefly stated, consisted primarily of the testimony of 3 co-conspirators, Richard Palmer, Richard Thurlow and Gerald Mitchell. They testified that the five trips were made to Jamaica for the purpose of smuggling marijuana into the United States.

Mitchell testified that in March, 1973 he and Robert Vissa prepared the sloop, "Good News" for a trip to Jamaica in June to smuggle marijuana into the United States (*Tr 660 - 661).

Palmer testified that during May, 1973 500 pounds of marijuana was smuggled from Jamaica by plane and boat and eventually transported to the Rye Hilton Hotel in Portchester New York. Mitchell, Calabro, Mecca and Wilner then transported the marijuana to the home of Vissa and Calabro, where the contraband was weighed and packaged (Tr 670 - 678; 960 - 961).

In June two planes, one occupied by Wilner and Mitchell and the other by Vissa and Palmer, flew marijuana from Jamaica to Williams Island in the Bahamas. From there it was transported by boat to Florida where it was loaded into a car for a trip to New York (Tr 685 - 710; 1409 - 1417)

The evidence did not connect the appellant Robert Vissa with either the August, 1971 or August, 1973 trips. At the close of governments case the court struck all testimony

Tr-Transcript of Trial

relating to the August, 1971 and 1973 trips holding that the evidence failed to establish that those dates were part of a single conspiracy.

The jury convicted three defendants, Robert Vissa, Robert Wilner and Richard Belanger and acquitted four defendants, Nicholas Calabro, Steven Smith, Gary Stephan and Paul Stephan.

QUESTIONS PRESENTED

1. Whether the prosecutor's summation denied the appellant a fair trial.
2. Whether the appellant was entitled to a Judgment of Acquittal on Count One.
3. Whether the Court erred in amending the indictment and the proof.

POINT I

PROSECUTOR'S SUMMATION
DENIED THE APPELLANT
A FAIR TRIAL.

During his summation the prosecutor said:

"--- The problem of drugs in this community needs no amplification, not only in this community but in this country. We are dealing here with a very serious case. Every case is serious. But there is a lot of marijuana and a lot of money involved in these bags". (TR 2103)

"--- Thurlow did his time, Mitchell did his time, Palmer is going to get sentenced in a few weeks. How about the rest of them?

--- Ladies and gentlemen, if you let them walk out of here, they'll be laughing all the way to Williams Island". (TR 2103)

Trial counsel for the appellant Vissa took exception and requested a mistrial. The motion was denied and no curative instructions were given. (TR 2158-2161)

We submit that the foregoing was deliberate attempt by the prosecutor to inflame the passions of the jury and to have them decide the case on prejudice matters completely irrelevant to the issue of whether the government proved its case beyond a reasonable doubt.

In view of the uncorrected statements it was impossible for the jury to disregard the subject matter and the measure of punishment and to decide the case free of prejudice.

Accordingly, we contend that the defendant was denied a fair trial. Berger v. United States 295 U.S. 78 (1935); United States v. White 486 F2d 204 (2 Cir. 1973); United States v. Drummond 481 f2d 62 (2 Cir. 1973); United States v. Burgos 304 F2d 177 (2 Cir. 1969).

POINT II

THE APPELLANT WAS ENTITLED TO A JUDGMENT OF ACQUITTAL ON COUNT ONE.

At the end of the government's case all the defendants moved to dismiss Count One on the grounds that the indictment charged a single conspiracy from August 1971 to December 1973 while the evidence proved multiple conspiracies in violation of the holding in Kotteakos v. United States, 328 U.S. 750 (1946).

After extensive argument (TR 1738-1816) the Court denied the motion but concluded that the trips to Jamaica in August 1971 and August 1973 did not relate to the trips made in March, May and June, 1973. (TR 1757, 1816).

The Court found that the evidence established three separate conspiracies involving 11 defendants and two additional unindicted co-conspirators while the indictment merely charged a single conspiracy.

Therefore, we contend that the court erred in failing to dismiss Count One on the authority of Kotteakos v. United States 328 U.S. 750 (1946).

POINT III

COURT ERRED
IN AMENDING THE
INDICTMENT AND THE PROOF.

After the Court concluded that more than one conspiracy had been established, the Court over objection struck the evidence relating to the August 1971 conspiracy and to the August 1973 conspiracy and amended the indictment by removing an overt act. The Court also instructed the jury to disregard the evidence relating to those trips. (TR 1822-1825, 2106, 2132, 2150).

We submit that the foregoing was error in that

1. An amendment to the body of an indictment renders the conviction void. *Ex Parte Bain* 121 U.S. 1, 7 S. Ct. 781 (1887); *Heisler v. United States* 394 F2d 692 (9 Cir. 1968) and

2. It prejudiced the appellant Vissa in that it eliminated the proof necessary to establish the defense that the government had proved a multiple conspiracies rather than the single conspiracy charged.

POINT IV

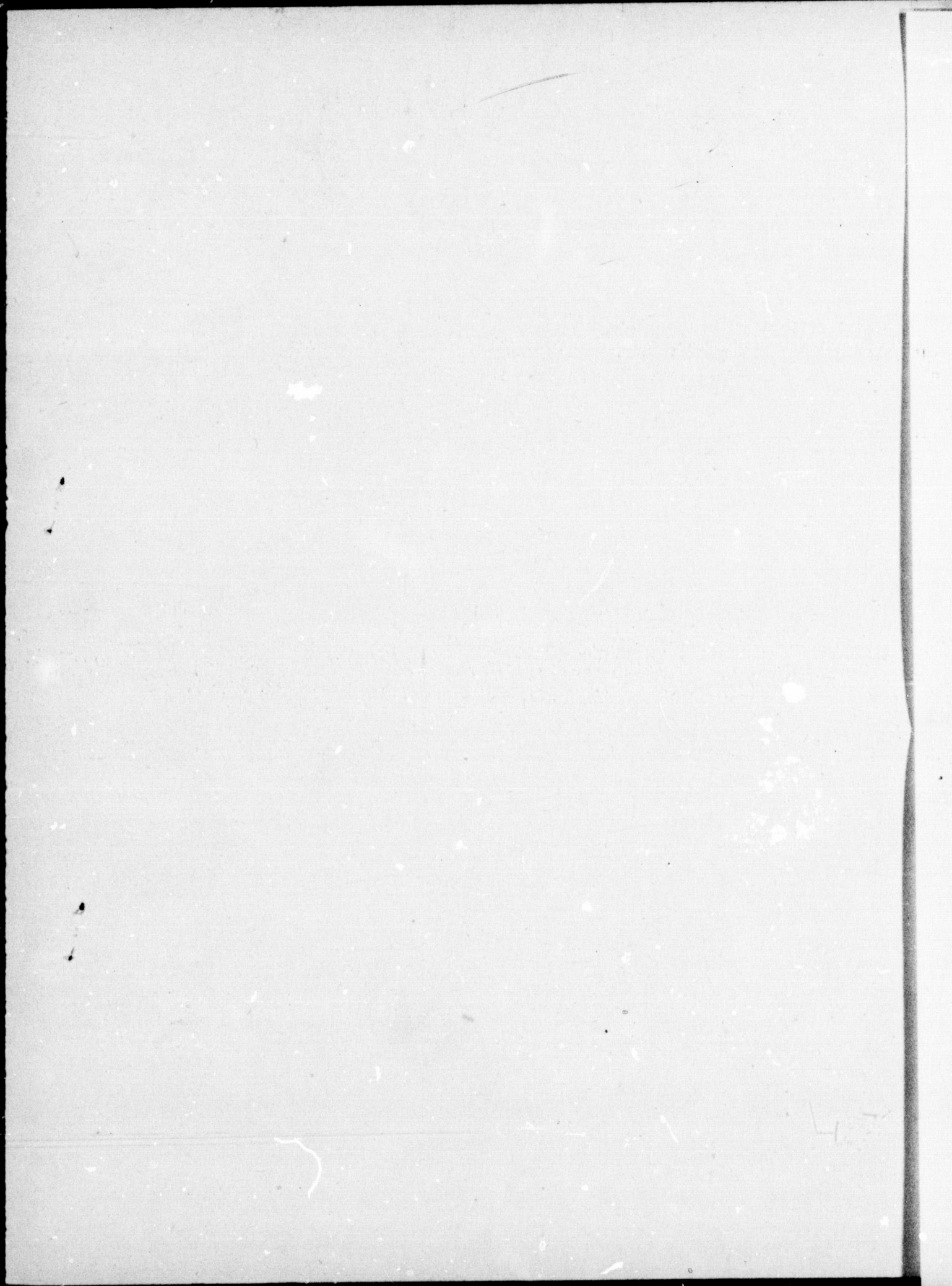
PURSUANT TO RULE 28(1) OF THE FEDERAL
RULES OF APPELLATE PROCEDURE, APPELLANT
VISSA RESPECTFULLY JOINS IN THE ARGUMENTS
RAISED BY HIS CO-APPELLANTS IN THIS COURT
INsofar AS THEY ARE APPLICABLE TO HIM AND
NOT INCONSISTENT WITH THE POINTS RAISED
IN THIS BRIEF.

CONCLUSION

Appellant Vissa's conviction on Counts One and Two
of the indictment should be reversed.

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

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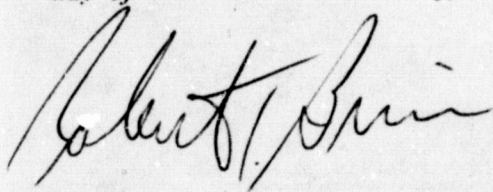
Affidavit of Personal Service

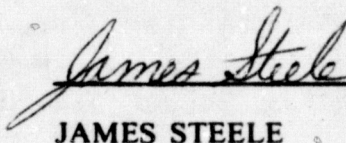
STATE OF NEW YORK, COUNTY OF New York

I, James Steele, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street, New York, New York
That on the 27th day of March 1975 at Federal Courthouse, Foley Square, N. Y. N. Y.

deponent served the annexed Brief upon
Paul J. Curran, U.S. Attorney, Southern District.
the Attorney in this action by delivering ² true copy ^{es} thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 27th
day of March 1975




JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975